In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 819

RICHARD LAMAR PATTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Northern District of Georgia of violations of the liquor laws. On November 4, 1965, he was given a general sentence of imprisonment for two years. The court of appeals affirmed the conviction *per curiam* (Tr. 125).

Two agents of the Alcoholic and Tobacco Tax Division testified that on April 19, 1965, agent Billy Moore conducted a general survey of the countryside near petitioner's residence, and that he discovered two stills. One ("Still No. 1") was located approximately 300 yards northeast of petitioner's residence, and the other ("Still No. 2"), approximately 150 yards southeast of the residence (Tr. 16–17). A footpath ran from Still No. 2 (which was not, at that time, operational) to the kitchen door of petitioner's residence. There was no other path to the site (Tr. 17).

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Still No. 1, when found, was still warm from use. A mule and cart track ran from that still to an abandoned house used by petitioner as a barn, outside of which were found petitioner's mule and cart. There were no other approaches leading to the site. On that path, Moore found thirty-six gallons of whiskey, upon none of which were affixed the proper revenue stamps (Tr. 16–18).

When Moore initially discovered the illegal stills, he radioed for the assistance of other agents (Tr. 16). Shortly thereafter petitioner returned to the area, and agent Frazier, in response to Moore's radio message, pulled his car behind that of petitioner. Frazier noticed three cases of fruit jars in the back seat of petitioner's car. Petitioner was arrested and told that he was entitled to counsel, and that any statements he made might be used against him. Petitioner denied possession or ownership of the illegal stills. He said that he knew that the stills were being worked through his yard (Tr. 20–24).

After the arrest, the cases of fruit jars were removed from petitioner's vehicle. Two of these cases contained used jars which smelled of whiskey (Tr. 25). Similar jars and gallon jugs were found concealed in junk automobile bodies lying around the outside of petitioner's abandoned house (Tr. 25–26, 52). Also found in an abandoned automobile was a burlap bag containing 25 pounds of barley malt (Tr. 52).

At the conclusion of the government's case, petitioner moved to suppress all testimony relating to articles found on the grounds of illegal search and seizure. The motion was denied (Tr. 65).

Petitioner testified that he purchased the jars, which were to be used for canning food, from a Mrs. James in Clayton, Georgia, and that the barley malt was used only for feeding his chickens.

1. There is no merit to petitioner's argument that the evidence against him was obtained by an illegal search and seizure. No constitutional rights of petitioner were violated when agent Moore discovered the illegal stills and whiskey in the nearby field. *Hester* v. *United States,* 265 U.S. 57; *United States* v. *Whitmore,* 345 F. 2d 28 (C.A. 6), certiorari denied *sub nom. Anderson* v. *United States,* 382 U.S. 991; *United States* v. *Hassell,* 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965; *United States* v. *Myers,* 329 F. 2d 280 (C.A. 3). Nor were his rights violated when agent Frazier observed the fruit-jar cases in the back seat of petitioner's car. See *United States* v. *Lee,* 274 U.S. 559, 563; *Haerr* v. *United States,* 240 F. 2d 533, 535 (C.A. 5).; *Ellison* v. *United States,* 206 F. 2d 476 C.A.D.C.).

After observing the two illegal stills, from which the only approaches led to petitioner's property, the agents had sufficient probable cause to place petitioner under arrest and to seize the jars on the back seat of his car, which had been discovered at the time of his arrest. The removal of the fruit jars and barley malt from the abandoned automobile bodies strewn about petitioner's property also involved no entry into a constitutionally protected area. See *Hester* v. *United States, supra.*[1]

[1] Although the agents admitted searching the abandoned house used as a barn, the record, which is not completely clear, does not show that any evidence introduced at the trial was obtained during that search. Agent Moore testified that some

2. Petitioner's challenge to the sufficiency of the evidence is unwarranted. Petitioner's possession of the illegal still, non-tax-paid whiskey, and raw materials may be proved circumstantially, *United States* v. *Burch*, 313 F. 2d 628 (C.A. 6), as may petitioner's carrying on of the business of a distiller. Cf. *United States* v. *Gainey*, 380 U.S. 63. That petitioner was not found directly at the still sites is of no moment. The record overwhelmingly supports a finding that petitioner had effective possession of the still.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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jars were set in front of the door (Tr. 26), but it is not clear whether these jars were removed from the barn or from somewhere else. Nor is it clear whether these jars were used for bottling moonshine whiskey or for canned foodstuffs (See Tr. 55).

[2] Petitioner's reliance on *United States* v. *Romano*, 382 U.S. 136, is misplaced. In that case, this Court held unconstitutional the legislative presumption (26 U.S.C. 5601(b)(2)) that "possession, custody, or control" of a still or distillery apparatus may be presumed from proof of the accused's presence at the still site. In the instant case, however, this legislative presumption was not charged to the jury, and the conviction was based upon overwhelming circumstantial evidence.

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